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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1604

THE PEOPLE OF THE STATE OF ILLINOIS ex rel. Illinois Federation of Teachers, AFT, AFL-CIO; OSCAR WEIL, its representative; WILLIAM STEWARD, SR., individually and as representative of a class; GENE ALEXANDER; HELEN BJORKMAN; LOUISA GRISHAM, individually and as representative of a class; ANN WAHL; NORMAN G. SWENSON, individually and as representative of a class; ARTHUR C. DONART; FRANK BANKS; HOWARD WILCOX, individually and as representative of a class; BERNICE HAYES; ALICE WEATHERWAX, individually and as representative of a class; and DOROTHY BURGESS, individually and as representative of a class,

Petitioners,

vs.

GEORGE W. LINDBERG, as Comptroller of the State of Illinois, ALAN J. DIXON, as Treasurer of the State of Illinois, and DANIEL J. WALKER, as Governor of the State of Illinois,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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DANIEL WALKER, Governor of the State of Illinois, GEORGE W. LINDBERG, Comptroller, and ALLEN J. DIXON, Treasurer, by WILLIAM J. SCOTT, Attorney General of the State of Illinois, file this brief in opposition to the Petition for Writ of Certiorari to the Supreme Court of Illinois.

OPINION BELOW

The decision of the Illinois Supreme Court, reported at 60 Ill. 2d 266, 326 N.E. 2d 749 (1975), affirms two separate unreported trial court rulings of the Circuit Court of Cook County, Illinois: No. 73 CH 5722, included herein as Appendix A; and No. 73 L 18562, included herein as Appendix B.

JURISDICTION

The jurisdiction of this Court has heretofore been urged, and denied upon the identical facts and statutes and on behalf of the identical class of persons as alleged in the case at bar, in *Illinois Education Assoc., et al.* v. *Walker,* docketed as 73-1586, cert. denied 417 U.S. 947, 94 S. Ct. 3072 (June 10, 1974).

QUESTIONS PRESENTED

Whether the judicial branch has power to override the executive and legislative branches in an exercise of the veto and reduction power provided in the Illinois Constitution.

CONSTITUTION AND STATUTES INVOLVED

United States Constitution

Tenth Amendment:

> "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.'

United States Constitution

Eleventh Amendment:

> "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against any one of the United States by citizens of another state, or by citizens or subjects of any foreign state."

1970 Illinois Constitution

Article II, Section 1:

> "The legislative, executive and judicial branches are separate. No branch shall exercise powers properly belonging to another."

1970 Illinois Constitution

Article IV, Section 9(b):

> "(b) If the Governor does not approve the bill, he shall veto it by returning it with his objections to the house in which it originated. . . ."
>
> * * * *
>
> "(d) The Governor may reduce or veto any item of appropriation in a bill presented to him. Portions of a bill not reduced or vetoed shall become law. An item vetoed shall be returned to the house in which it originated and may become law in the same man-

ner as a vetoed bill. An item reduced in amount shall be returned to the house in which it originated and may be restored to its original amount in the same manner as a vetoed bill, except that the required record vote shall be a majority of the members elected to each house. If a reduced item is not so restored, it shall become law in the reduced amount."

1970 Illinois Constitution

Article VIII, Section 2(a):

"The Governor shall prepare and submit to the General Assembly, at a time prescribed by law, a State budget for the ensuing fiscal year. The budget shall set forth the estimated balance of funds available for appropriation at the beginning of the fiscal year, the estimated receipts, and a plan for expenditures and obligations during the fiscal year of every department, authority, public corporation and quasi-public corporation of the State, every State college and university, and every other public agency created by the State, but not of units of local government or school districts. The budget shall also set forth the indebtedness and contingent liabilities of the State and such other information as may be required by law. Proposed expenditures shall not exceed funds estimated to be available for the fiscal year as shown in the budget."

1970 Illinois Constitution

Article VIII, Section 2(b):

"The General Assembly by law shall make appropriations for all expenditures of public funds by the State. Appropriations for a fiscal year shall not exceed funds estimated by the General Assembly to be available during that year."

Civil Practice Act, § 57.1(1)

Ill. Rev. Stats. 1973, Ch. 110, § 57.1(1):

"* * * *

In no event shall the Court entertain any action or proceeding for a declaratory judgment, decree or order involving any political question where the defendant is a State officer whose election is provided for by the Constitution; . . ."

STATEMENT OF THE CASE

The 78th Illinois General Assembly presented the Governor various appropriation bills providing funding for the State teachers' pension and retirement system.

Within the time provided, and in the manner prescribed by Article IV, Section 9(b), (d) of the 1970 Illinois Constitution, the Governor vetoed and reduced items in HB 918, HB 1504, SB 183, SB 381, SB 443, SB 449, SB 478, SB 488, SB 503, SB 698 and SB 1178, and returned the bills to the houses in which they originated.

The vetoed and reduced appropriation bills were not passed or restored to their original amount by the General Assembly.

Petitioners, on behalf of the class of beneficiaries of the Teachers' Retirement System of Illinois (Downstate), State Universities Retirement System of Illinois (Universities System) and Public School Teachers Pension and Retirement Fund (Chicago Fund), brought suit against the Illinois Governor, Comptroller and Treasurer for declaratory judgment and mandamus to compel expenditures as if the appropriation bills had been passed or restored to their original amount, notwithstanding the veto and reduction by the Governor and refusal of the General Assembly to override.

ARGUMENT

I.

THE JUDICIAL BRANCH CANNOT EXERCISE POWERS VESTED IN THE EXECUTIVE AND LEGISLATIVE BRANCHES.

Petitioners disapprove the Governor's veto and reduction of certain appropriation bills, and the refusal of the General Assembly to pass the bills over the Governor's objections. Petitioners ask the courts to judicially effect an override of the vetos and reductions, and to cause the original appropriation bills to become law by court decree.

There is no contention that the vetos and reductions were not executed in the manner prescribed in the 1970 Illinois Constitution, Article IV, § 9.

It is uncontested that the 78th Illinois General Assembly, having power to do so, declined to restore the reductions or to pass the appropriation bills over the Governor's actions, as is provided in the Constitution, Art. IV, § 9(c), (d).

Budget making and the power to appropriate public funds are expressly vested by the Constitution, Article VII, § 2(a), (b), in the Governor and the General Assembly. If this exclusive Legislative and Executive authority to raise and expend moneys was intended to be abridged by the judiciary, appropriate language would have been utilized, as in the Transportation Bond Act, Ill. Rev. Stats. 1973, Chap. 127, § 707 or the School Construction Bond Act, Ill. Rev. Stats. 1973, Chap. 122, § 1211.

In *Meyers* v. *United States*, 272 U.S. 52, 116, 47 S. Ct. 21 (1926), the Court said:

> "Accordingly, the Constitution was so framed as to vest in the Congress all legislative powers therein granted, to vest in the President the executive power, and to vest in one Supreme Court and such inferior courts as Congress might establish, the judicial power. From this division on principle, the reasonable construction of the Constitution must be that the branches should be kept separate in all cases in which they were not expressly blended, and the Constitution should be expounded to blend them no more than it affirmatively requires. Madison, 1 Annals of Congress, 497. This rule of construction has been affirmed by this Court in Meriwether v. Garrett, 102 U.S. 472, 515; Kilbourn v. Thompson, 103 U.S. 168, 190; Mugler v. Kansas, 123 U.S. 623, 662."

Article II, § 1 of the 1970 Illinois Constitution expressly provides:

> "The legislative, executive and judicial branches are separate. No branch shall exercise powers properly belonging to another."

Illinois case decisions are a continuing reaffirmation of this separation of powers. Under the 1848 Illinois Constitution, see *People ex rel. Billings* v. *Bissel*, 19 Ill. 229, 230-231, 233 (1857). Under the 1870 Illinois Constitution, see *People ex rel. Bruce* v. *Dunne*, 258 Ill. 441, 447, 449-450, 452-453, 101 N.E. 2d 560 (1913). Under the 1970 Constitution, see *County of Cook* v. *Ogilvie*, 50 Ill. 2d 379, 384, 280 N.E. 2d 224, 384 (1972).

The 1970 Illinois Constitution, Article IV, §9 in great detail, and without exception, delegates to the Governor the power to veto or reduce appropriation bills, and grants to the General Assembly the power to override the Governor.

People ex rel. Millner vs. Russell, 311 Ill. 96, 99-101, 109 (1924), is a case virtually identical to the instant action, and dispositive of the precise issue raised by Petitioners.

In *Millner,* relators argued that a Governor did not have authority to veto an appropriation bill required to fund obligations under existing laws. The Illinois Supreme Court specifically held:

> "... The language of the constitution it will be seen, is broad and all-inclusive. It requires 'every bill' passed by the General Assembly to be approved by the Governor, or, in case he disapproves it, to be passed over his veto before it becomes a law. The language is direct, plain, and affords no basis for the construction that bills or items of bills making appropriations for salaries of officers of the State government were intended to be excepted from bills the Governor has power to veto. . . . The constitution and laws necessarily invest public officials with certain powers in the performance of the duties of the office. If the official neglects to exercise the powers necessary to a proper discharge of duties of the office, or if he wrongfully exercises or exceeds his powers, the evil cannot be remedied by holding he never had the power he abused. It would be a greater evil to so hold than is the infrequent evil of abuse or wrongful exercise of powers by public officers. Men may, and do, honestly differ about what powers the constitution and laws confer on public officials and what acts are a proper exercise of the powers conferred. It would be a most unwise departure from our long-existing standards and principles of government to deny the existence of lawfully conferred powers because their abuse or wrongful exercise is possible.
>
> * * *
>
> We think the power to collect and appropriate the revenue of the State is one peculiarly within the discretion of the legislature. It is a very delicate and responsible trust, and if not used properly by the legislature at one session the people will be certain to send to the next more discreet and faithful servants. It is

> within the legitimate power of the judiciary to declare the action of the legislature unconstitutional where that action exceeds the limits of the supreme law, but the courts have no means and no power to avoid the effects of non-action. The legislature being the creative element in the system, its actions cannot be quickened by the other departments. Therefore, when the legislature fails to make an appropriation we cannot remedy that evil. It is a discretion specially confided by the constitution to the body possessing the power of taxation."

Cloaked in the felicitious trappings of teachers' pension funding, to accomplish their ends, Petitioners advocate no less than destruction of the most fundamental and long standing constitutional principles of separation of powers.

II.

POLITICAL QUESTIONS ARE NOT JUSTICIABLE

The instant litigation does not involve diminution or denial of vested pension and retirement benefits. No Petitioners are not receiving the pensions to which they are entitled.

The Illinois pension system actually has current assets in excess of $1.6 billion dollars, and is continuing to grow at a rate in excess of $250 million per year. Even if all new contributions were to cease today, the assets are now sufficient to pay all pensions due in the next ten years.

The debate over so-called "full funding" of the State pension system, i.e. "paid-up" versus Social Security type financing, has been a continuing public policy battle, of which the present litigation is but the latest thrust. (See Verbatim Proceedings, Sixth Illinois Constitutional Convention, Vol. IV, pp. 2925-2933) Petitioners seek to have the courts decide that political question.

The vetos of the Governor, and the refusal of the 78th General Assembly to override, or to restore reductions by even a majority vote, thus a Legislative concurrence in the final executive budget figures, is patently political and nonjusticiable.

Section 57.1 of the Illinois Civil Practice Act, Ill. Rev. Stats. 1973, Chap. 110, §57.1 provides:

> ". . . In no event shall the Court entertain any action or proceeding . . . involving any political question where the defendant is a State officer whose election is provided for by the Constitution."

See the Tenth and Eleventh Amendments to the United States Constitution.

In *Baker* v. *Carr*, 369 U.S. 186, 210, 82 S. Ct. 706 (1968), the court said:

> "The nonjusticiability of a political question is primarily a function of the separation of powers."

It is not a solution to Petitioners' complaints to run rough-shod over the constitution.

> "If other changes are needed in the present system, they should be sought in the legislature and not in the courts."
>
> *McInnis* v. *Shapiro*, 293 F. Supp. 327, 337 (N.D. Ill. Ed. 1968), aff'd sub nom. McInnis v. Ogilvie, 394 U.S. 322 (1969)

See also *People ex rel. Hamer* v. *Jones*, 39 Ill. 2d 360, 235 N.E. 2d 589, 594, 596 (1968)

CONCLUSION

The Illinois Constitution embodies a separation of powers, and checks and balances between the three branches of government.

The executive branch is expressly granted the power of veto over legislative acts, including reduction of appropriation bills. The legislative branch is expressly granted the power to override vetos and to restore reductions in appropriations.

No power is granted to the judicial branch with respect to vetos or overrides exercised pursuant to the Constitution.

In accordance with the 1970 Illinois Constitution, the Governor and General Assembly have exercised their veto and reduction powers with respect to certain appropriation bills for the funding of the State teachers' pension and retirement system.

Courts do not have jurisdiction to supplant the other branches of government and to judicially override a veto, or to direct the passage of legislation by decree.

Petitioners' complaints are not justiciable and were properly dismissed.

WHEREFORE Respondents respectfully pray that the Petition for Writ of Certiorari to the Illinois Supreme Court be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A

AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, et al.,

Plaintiffs

vs.

DANIEL WALKER, as Governor of the State of Illinois,

Defendant

No. 73 CH 5722

MEMORANDUM OPINION

The Complaint seeks a declaration that the veto and certain reductions by the Governor of appropriations by the General Assembly for contributions by the State to the State Universities Retirement System are void

A Motion to Strike the Complaint in behalf of the defendant and a Motion for Summary Judgment in behalf of the plaintiffs were filed.

Upon examination of the pleadings and the Memoranda filed in connection with these Motions by cousel, it is my opinion as follows:

1. The above suit, being a class action, it properly belongs in Chancery.

2. The Complaint alleges that for the fiscal year 1974, "the amount which is required" in accordance with actuarial computations is $74,940,500. The General Assembly appropriated the sum of $54,759,100, and also, a sup-

plemental appropriation of $12,138,599. The Governor reduced the appropriation to the sum of $20,190,600 and vetoed the supplemental appropriation of $12,138,599.

3. The plaintiffs base their Complaint upon the following constitutional and statutory provisions:

> (a) Article XII, Section 5 provides that membership in any pension or retirement system shall be an enforceable contractual relationship, the benefits of which shall not be diminished or impaired;
>
> (b) Chapter 108½, Section 15-156 provides that the required state contributions to the State Universities Retirement System "are obligations of the State of Illinois;"
>
> (c) Chapter 108½, Section 15-555 provides that the contributions from the state appropriations for any fiscal year shall not be less than an amount which is required to fund fully the current service costs in accordance with actuarial reserve requirements * * * plus interest at the prescribed rate on the unfunded accrued liability.

4. The Complaint seeks a declaration by this Court that the Governor's veto and reductions are void because he lacks the power and authority to veto or reduce appropriations "which are specifically mandated and required by pre-existing law, constitutional or statutory."

5. The Governor acted in accordance with the following:

Article IV. Section 9 of the 1970 Illinois Constitution provides:

> "(a) Governor may reduce or veto any item of appropriation in a bill presented to him."

Did the Governor violate the requirements under pre-existing law? It is obvious to this Court that the Governor has not by his veto and reduction violated "any mandated requirement of the pre-existing law, constitutional or statutory," for the following reasons:

(a) He has complied with the mandate by providing for funding the current service costs by the appropriation of $20,190,600;

(b) Whether or not this amount fully covers the current service costs plus accrued interest represents an issue of fact as to adequacy. By failing to override the veto and reduction, it must be assumed that the legislature agreed with the Governor as to adequacy;

(c) The Complaint alleges that the actuarial requirement is $74,940,500. The Governor is not obliged to accept this amount as the actuarial reserve requirement. Obviously, in his judgment, the sum of $20,190,600 is adequate for the funding in compliance with the constitutional and statutory requirement;

(d) The Governor has the right to disagree with the General Assembly as to what is the actuarial requirement for such funding, as in any appropriation by the General Assembly.

6. The *adequacy* of the amount necessary for such funding is for the General Assembly and the Governor to determine and is not available to question by the plaintiffs in any judicial proceedings. The Court is without power to adjudicate the adequacy of any appropriation.

7. This Court has no jurisdiction to question the amount of any appropriation by the General Assembly and by the Governor, even if their computations are in error.

8. The veto and reductions did not impair the contractual obligations of the State. The obligation of the State is to fund the "current service costs and certain accrued interest." The appropriation of the sum of $20,190,600 satisfied that obligation of the State.

9. The Court of Claims' decision is not a precedent which this Court may follow. It is a suit against the State of Illinois and does not involve the power of veto or reduction by the Governor. The attention of the Court of Claims was evidently not called to the fact that the constitutional and statutory mandate for funding was complied with by whatever appropriation was made by the General Assembly and that the only question before the Court was the adequacy of such appropriation. With all due respect to the Court of Claims, I cannot accept the decision as stare decisis.

Accordingly, the Motion to Strike the Complaint by the defendant should be sustained; the Motion for Summary Judgment by the plaintiffs should be denied. Please present a formal order to the above effect.

/s/ SAMUEL B. EPSTEIN

SAMUEL B. EPSTEIN, Judge

APPENDIX B

People ex rel. Illinois Federation of Teachers

v.

Dan Walker, et al.

No. 73 L 18562

ORDER

This matter having come before the Court on defendants' Motion to Dismiss, the Court having reviewed the memoranda of the parties and having heard arguments, the Court finds and it is hereby ordered:

1. This Court lacks jurisdiction to declare the constitutionality and/or legal validity of the Governor's veto, and

2. The defendants' Motion to Dismiss is therefore granted and this cause is hereby dismissed.

/s/ EDWARD F. HEALY,

Judge.

EED THROUGH